

DATE OF ISSUE

DECEMBER 2010

SUBJECT

2006 CONSENT DECREE COMPLIANCE

This construction memorandum provides information to assist in complying with the Consent Decree of 2006. Do not contact the Environmental Protection Agency (EPA). The Environmental Section is the Department's designated liaison with the EPA. Direct any questions regarding compliance with the consent decree to the Environmental Section, Stormwater Compliance Coordinator

The table below lists 2006 consent decree stipulated penalties that pertain to contract administration of construction projects. Many of these penalties are accumulative over time, and can add up fast to a significant sum of money. Multiple penalties may also be accrued for the same violation.

2006 Consent Decree Stipulated Penalties

1	Failure to ensure properly trained Contractor Water Pollution Control Manager (WPCM)	\$750 per day of construction
2	Failure to have environmental inspections performed by a qualified environmental inspector per consent decree requirements	\$750 for each such inspection
3	Failure to inspect within 24 hours after the conclusion of a rain event of 0.5 inches or greater, or every 24 hours during an extended rain event (paragraph 7B)	\$750 per failure
4	Failure to notify the Contractor within 24 hours of any deficiencies discovered as a result of inspections (paragraph 7C)	\$750 per failure
5	Failure to correct any deficiencies within five days after the day of the inspection or prior to the next rain event, whichever is sooner (paragraph 7E)	\$750 per day
6	Failure to properly complete an inspection form (paragraph 8 of the consent decree)	\$750 per failure
7	Failure to comply with the third party inspection requirements (paragraph 9)	\$1,000 per inspection not timely performed.
8	Failure to comply with paragraph 12 of the Consent Decree	\$1,500 for days 1-10; \$2,500 for days 11-20; \$3,500 for days 21 and on
9	Failure to comply with paragraph 13 of the Consent Decree.	\$1,500 for days 1-10; \$2,500 for days 11-20; \$3,500 for days 21 and on
10	Failure to comply with paragraph 14 of the Consent Decree.	\$1,500 for days 1-10; \$2,500 for days 11-20; \$3,500 for days 21 and on
11	Failure to report known violations (within 5 days) of the Consent Decree and/or the Construction General Permit to the EPA. (paragraph 15 of the Consent Decree).	\$750 per day

1) Failure to ensure properly trained WPCMs.

Prior to project start, verify the Contractor's WPCM has been certified within the 12 months prior to initiating any construction activities, and that the certification is from a Department approved training course. The date that the NOI waiting period ends should be the date used for the start of construction activities. Contact the District trainer if you are unsure whether the training course is approved. The verification should also be performed whenever the WPCM changes or an additional WPCM is added on the project.

2) Failure to have environmental inspections performed by a qualified environmental inspector per Consent Decree requirements.

Prior to project start, verify the environmental inspector certifications are current for Departmental and consultant inspectors. Perform this verification whenever the environmental inspector changes on the project.

3) Failure to inspect within 24 hours after the conclusion of a rain event of 0.5 inches or greater, or every 24 hours during an extended rain event (paragraph 7B)

This consent decree requirement applies in addition to what is required by the NPDES Construction General Permit. All projects must be inspected within 24 hours of a 0.5 inch rain event, regardless of the inspection frequency.

4) Failure to notify the Contractor within 24 hours of any deficiencies discovered as a result of inspections (paragraph 7C).

The contractor must be made aware of any deficiencies within 24 hours of the inspection. It is not required that the contractor sign the ITD-2802 within this time period.

Ensure that the notification is documented and that it is kept with the stormwater pollution prevention plan (SWPPP). While it is not required, this may be accomplished by having the contractor sign the ITD-2802 within the 24 hour time frame. It may also be accomplished using an Avoid Verbal Order (AVO), electronic mail, a fax or written communication to the Contractor, or notation in the construction diary that the deficiencies were discussed with the contractor.

Third party inspectors must provide written findings and recommendations to the Department and the Contractor that contains the information required by paragraph 8 of the consent decree within 24 hours of an inspection. It is recommended that 3rd party inspectors be required to supply this information using the ITD-2802. This notification must also be documented as above and kept with the SWPPP.

5) Failure to correct any deficiencies within five days after the day of the inspection or prior to the next rain event, whichever is sooner (paragraph 7E).

This requirement is more restrictive than the NPDES Construction General Permit. Ensure that the date the corrective action was completed is documented. It is not required that an additional environmental inspection be conducted and ITD-2802 be completed, to verify and document corrective action. However, the corrective action dates must be documented on the ITD-2802 during the next Department inspection.

6) Failure to properly complete an inspection form (paragraph 8 of the consent decree).

The ITD-2802 Stormwater Compliance Inspection Form contains all the elements required by paragraph 8 of the consent decree and the construction general permit. All boxes must be completed (i.e. not left blank) including marking the applicable check boxes.

The inspection form must clearly describe inspection of best management practices (BMPs) devices and discharge locations including observations of conditions. The EPA approved Department & third party Inspection Procedures are attached to the 2802 form, and must be followed on all inspections.

It is not necessary that signatures be obtained within the inspection time-frame. However, it should be ensured that signatures are obtained in a timely manner; preferably within a week.

7) *Failure to comply with the third party inspection requirements (paragraph nine of the consent decree).*

Third party inspections are required on all projects that disturb five acres or more of soil and that are located in an “environmentally sensitive” area. “Environmentally sensitive” is defined as *“any area which would be directly impacted by stormwater discharges from the project, and which is designated critical habitat for any listed or endangered species, or which contains an immediate downstream water body that is listed as impaired by sediment by the Idaho Department of Environmental Quality under section 303(d) of the CWA”*.

During the construction season, 3rd party inspections must occur:

- 1) At least once every 30 days (unannounced) during the construction season.
- 2) A follow up inspection within 14 days if significant deficiencies were found.

The construction season does not include a project’s winter shutdown period provided that the project is temporarily stabilized.

The 3rd party inspector should be using the ITD-2802 for their inspections. The 3rd party inspector must also provide a follow-up written report within 7 days if changes to the SWPPP or BMPs were necessary.

All written findings, recommendations and reports by a 3rd party inspector must be *“maintained in the file with the SWPPP located at the site, and made available for review by the EPA during any inspection of the project”*

Per the consent decree: *“ITD shall implement all recommendations by the 3rd party inspector unless infeasible. If ITD rejects a recommendation as infeasible, it shall place in its files on the job site a written description by the Resident Engineer of why the recommendation(s) was not followed.*

The Department may seek a waiver of 3rd party inspections. See the consent decree paragraph 10 for waiver requirements.

8) *Failure to comply with paragraph 12 of the consent decree.*

Paragraph 12 requires the following: *ITD and contractor’s shall adhere to Section 212 of the ITD Standard Specifications (2004), as amended, and other ITD BMP guidance materials at all times at all projects. ITD shall allow no clearing and grubbing outside the physical clearance limits shown on the site plans of any project, and no clearing or grubbing shall take place outside the schedule in the applicable SWPPP.*

As with other standard specifications, Section 212 is amended by the supplemental specifications and the contract proposal. Manuals may also be amended either by regular updates process or through memorandums if changes need to be implemented immediately. Make sure that the project is in compliance with contractual requirements and with current Department policies and procedures.

9) Failure to comply with paragraph 13 of the consent decree.

The Department must not allow any exposed unstabilized soils (i.e. effectively stabilized through application and maintenance of erosion controls) on Projects in the following counties during the winter shutdown period: **Boundary, Bonner, Kootenai, Shoshone, Benewah and Latah**. The winter shutdown period is at least from October 15 through April 15 of each year. All stabilization work must be in place by October 14 of each year.

The Department may request a waiver. The EPA has indicated that exemption requests will only be granted in exceptional cases (i.e. not the rule). Requests should be submitted at least 60 days prior to the October 15 winter shutdown deadline. See the 2006 consent decree for requirements on requesting a waiver.

10) Failure to comply with paragraph 14 of the consent decree.

The Department and the contractor must maintain all BMPs throughout the winter shutdown period in the following counties: **Boundary, Bonner, Kootenai, Shoshone, Benewah and Latah**.

Where feasible, and where inspections will not cause significant damage to the site, the Department must inspect the BMPs at least once per week during the winter shutdown period. Deficiencies must be corrected “within 5 days or before the next storm (i.e. snow, hail, sleet, rain) event, whichever is sooner.

The inspection findings, the remedy, and the existence of any conditions that the Department believes precluded timely access or correction of noted deficiencies must “*be documented and kept in ITD’s records for the Project’s stormwater discharge authorization.*”

11) Failure to report known violations of the Consent Decree and/or Construction General Permit within 5 days of discovery.

Immediately report potential violations via electronic mail using the ITD-2790 to the headquarters Environmental Section, Stormwater Compliance Coordinator so that the potential of exceeding the 5 day window is mitigated. The headquarters Environmental Section will evaluate the potential violations and will report actual violations in writing using the ITD-2790 to the EPA.

Corrective actions taken to repair BMP deficiencies are not consent decree violations if they are corrected as soon as possible but no later than 5 days after the day of the inspection, or prior to the next 0.5 inch rain event (and storm event during the winter shutdown period in the counties listed in item 10).

The two primary types of violations are administrative or paperwork related, and physical. Administrative or paperwork violations are those where procedures were not properly followed. The list below provides some examples of administrative or paperwork violations.

- Inspections did not occur within the required permit and/or consent decree frequencies as specified in the project SWPPP. (note: inspection frequencies are based on date of last inspection to date of current inspection).
- Unqualified environmental inspector conducts a stormwater compliance inspection.
- Contractor was not made aware of deficiencies within 24 hours.

- Deficiencies were not corrected within 5 days of the inspection or prior to the next 0.5 inch rain event, whichever was sooner.
- No WPCM on the project or WPCM is not properly certified.
- The requirements of the Stormwater Pollution Prevention Plan (SWPPP) were not followed.
- The SWPPP was not revised as required within 7 calendar days as specified in the CGP.

Physical violations are discharge of sediments or other pollutants above allowable limits off the project site or into waters of the United States.

Date of Original Issue: 8/08
Revise and Reissue: 12/10

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